

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

2 -----x
3 McLAUGHLIN,

3 Plaintiff,

4 versus CV 04-1945

5 PHILLIP MORRIS, ET AL., United States Courthouse
6 Defendant. Brooklyn, New York

6 -----x

7 September 12, 2005
8 10:00 a.m.

9 TRANSCRIPT OF HEARING

10 Before: HON. JACK B. WEINSTEIN, District Judge

11 APPEARANCES

12 Attorneys for Plaintiff:

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<p>1 THE COURT: Yes, everybody, I think, agrees with 2 that, including the defendants. 3 Were they buying because they thought lights meant 4 something other than less tar which was right on packages? 5 MR. HAUSFELD: And that gets us to certain analogies 6 by courts of the fraud aspects of a RICO violation. 7 THE COURT: They were required to put the amount of 8 tar right on the cigarette, right? 9 MR. HAUSFELD: No. 10 There is no package of lights that contain the FTC 11 numbers on the face of the package. What is on the face of 12 the package is lights. 13 THE COURT: What is on the face of the package is 14 the warning that these things have a habit but didn't all 15 their advertisements show the amount of tar? 16 MR. HAUSFELD: I think so. I think the 17 advertisements did but not the package. 18 We're focusing on the packages, your Honor, because 19 one of the elements that Courts looked at with respect to a 20 RICO fraud violation is: Was the allegation of fraud written 21 or oral? Was it uniform or variable? 22 That is all answered by the fact that we are 23 focusing on the descriptor lights on each and every package. 24 The courts in the Paine Webber case, for example, 25 the Second Circuit said: How do we know even though there may</p>	<p>Page 110</p> <p>1 MR. HAUSFELD: As to their documents and their 2 witnesses, yes. 3 So this boils down now to an industry understanding 4 that its very viability was in jeopardy, knowing that there 5 was a product which they were marketing called lights could 6 shift that market from regular to the light brand of cigarette 7 on the consumers's belief that lights were less harmful and 8 the market did shift and the documents that are in defendants' 9 own files unequivocally demonstrate that the lights market was 10 a health concerned market. It was created not to pull the 11 market or respond to consumer demand but to push the market, 12 say here is a light, safer cigarette. 13 THE COURT: Excuse me. Your PX 1 on the board there 14 says what lights meant to the consumer was less tar. Then you 15 had to go through the syllogism, less tar equals less harmful 16 therefore lights equal less harmful. 17 And the question I posed earlier to your learned 18 opponents and am posing to you is: Did the consumer go 19 through the less tar step because the tar amounts were decided 20 by the FTC, right? 21 MR. HAUSFELD: The precise amounts of tar delivery 22 to a machine were measured by the FTC but it was in the 23 defendants' own words common knowledge that less of something 24 harmful was safer. 25 THE COURT: Are you in a sense saying that the</p> <p>Page 112</p>
<p>1 have been a uniform written presentation that everyone 2 received that uniform written presentation? 3 Every package of lights had the word lights. You 4 could not get a package -- 5 THE COURT: And none of them had the amount of tar? 6 MR. HAUSFELD: I don't believe so. Not the package 7 itself. 8 THE COURT: Okay. 9 MR. HAUSFELD: You did not get a package of lights 10 with that descriptor unless you asked for that package of 11 lights by name. 12 So part of the questions that have troubled the 13 circuits and the district courts, that is the variability in 14 the material representation, the uniformity of the 15 representation and the receipt of the representation are all 16 absent here. 17 THE COURT: Do you have expert or other evidence 18 that lights meant less harmful to the user? 19 MR. HAUSFELD: Yes, every one of them including the 20 public health community including the defendants' own 21 documents and the defendants' own officers. 22 THE COURT: But the word lights independent of the 23 amount of tar meant less harmful? 24 MR. HAUSFELD: Yes. 25 THE COURT: And your experts say that?</p>	<p>Page 111</p> <p>1 consumer didn't go through the less tar analysis directly to 2 the conclusion at the instigation of the defendants that 3 lights meant less harmful? 4 MR. HAUSFELD: Yes, less tar was synonymous with 5 less harmful. So when they saw lights, lights was essentially 6 the -- was synonymous without going through the middle step 7 less harmful. Lights had less tar, less tar meant less 8 harmful, regardless of the specific numbers. 9 THE COURT: All right, I think you are giving up 10 something there but that's what you say, that is fine. 11 MR. HAUSFELD: What I am saying, without giving up 12 anything, your Honor, is there did not have to be a segregated 13 three-step approach. 14 THE COURT: If a kid wanted to go out and smoke and 15 he saw lights or she saw lights, did that kid go through the 16 lights equal less tar, less tar equals less harm, lights equal 17 less harm or did they just say lights means less medical 18 problems? 19 MR. HAUSFELD: Probably at the time that lights were 20 first introduced, there was more of a lights was less tar, 21 less tar was less harmful. 22 THE COURT: That is back in 1970. 23 MR. HAUSFELD: And over time the less tar less 24 harmful became subsumed automatically in the descriptor 25 lights.</p> <p>Page 113</p>